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August 5, 2004

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

In the Matter of A La Carte
And Themed Programming
Distribution on Cable
Television and Direct
Broadcast Satellite Systems
MB Docket 04-207

We enclose herewith an original and four copies of our Reply Comments in the
above captioned matter.

Sincerely,

Paul J. McGeady
General Counsel

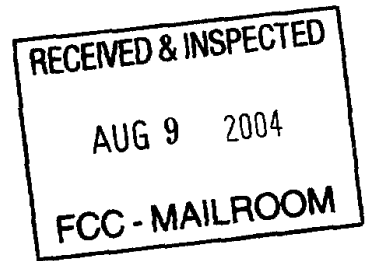
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.



In the matter of:

A La Carte and Themed Programming and)
Pricing Options for Programming)
Distribution on Cable Television and)
Direct Broadcast Satellite Systems)

MB Docket No. 04-207

**Reply Comments Of Morality
In Media Inc.**

Morality In Media desires to reply to certain comments in the Report of Michael L. Katz (which was commissioned by the Comcast Corporation). His arguments are summarized in his Executive Summary which we shall first address.

I. The Executive Summary

At the outset it is noted that such Comments "do not necessarily reflect the views of Comcast Corporation". We can assume, therefore, that these are not "Comments" of Comcast Corporation.

- (1) On Page ii, The Katz Report states that "bundling" is a common practice, but it gives only what can be called generic references. The Report gives no specific identifiable corporations or details so that the so called "bundling" can be examined to determine if it is true bundling in the sense here under consideration, is an Unfair Trade Practice or a possible violation of the Anti-Trust laws. The Report also mentions the "bundles" of programming offered

by Direct TV and Echo Star, but that is just another example of what this inquiry is all about and may very well be a prohibited practice when the contemplated Report is acted on by Congress. References to costs of creation of programming and distribution costs will be irrelevant if it is finally determined that the bundling contemplated by this inquiry is illegal. The reference to Cable Television Networks as Bundles, limps because that is not a true Bundle as the bundling problem is generally understood.

- (2) On Page iii Lines 5 to 13-The Report frames the question, but gives the wrong answer. It says that there is no logical or factual basis for claiming that tiers force people to pay for programming they don't want.¹ It then gives an economic argument. There is no mention of the real logical and factual basis why people (and perhaps Congress) are concerned. The concern revolves around two aspects of the situation, one is the resentment of the patron that he or she is "forced", to accept programming such as or similar to MTV to get "good" programs and the other is the fact that in some cases he or she must accept what he or she considers to be "immoral" programming to obtain what he or she considers to be "moral" programming. Whether this is "coercion" and a possible anti-trust or unfair trade practice are primarily legal and moral and not economic concerns. It is, nevertheless, undoubtedly true that many subscribers would willingly pay the economic price (if such there, be) for unbundling if it were available, to avoid being coerced or subject to what he

¹ See Appendix Footnote 1

or she may consider immoral, although it is only speculation that the price will increase.²

(3) On Page iii Lines 19 to 31- The Report, tells us that if a consumer “does not wish to view” all the programs he or she can engage in “selective viewing”. This puts the Onus on the consumer to shield himself or herself from objectionable programming or what he or she considers unsuitable or immoral, in effect, in some cases, asking the consumer to turn it off after he or she has been assaulted. The inconvenience and Onus is on the customer when he or she cannot get a La Carte. He or she should not have the burden of avoiding objectionable programs. (cf. Pacifica).

It goes without need of proof that indecent programming is available on Cable and Direct TV. The statute prohibits only Obscenity. Indecency is rampant. If Indecent programs are prohibited during the daytime hours on Broadcast Radio and TV to protect children and unconsenting adults, as specified in the Pacifica case, unbundling gives, to an extent, similar relief in Cable and Direct TV programming. The fact is that unbundling, could, to an extent, modify the necessity for Congress to extend the Broadcast Regulations to Cable and Direct TV.-After all, it comes through the same box into the same living room. The pig still gets into the parlor. Today the pervasive nature of Cable and Direct TV and the necessity to have the same in this modern world, makes nonsense of the argument that the man of the house “invited” the pig into the parlor.

² See Appendix Footnote 2

(4) On Page iv, The Report gives more economic reasons for not mandating Unbundling. For reasons given previously, these are not the main concerns for unbundling. There are more important concerns at stake here. The program variety it speaks of includes unwanted programming we are “forced” to accept to get that which we want.³ How does this differ from a customer at a local grocery store who is told he must buy an unsavory or unwanted product in order to obtain a bottle of milk-a typical tie-in sale. “Reduced program variety” is a small price to pay (if it occurs) to keep pigs out of the parlor.

(5) On Page v, The Report speculates on Reduction of new companies in the market, Reduction of overall viewing and Reduction of the range and quality of programming available. However, it offers no proof that this will occur. It is pure speculation -but where is the evidence? Where are the Surveys? The Focus Groups? The Proof? The same “speculation” is found in the claim that mini tiers would be unworkable and that price regulation will follow unbundling-The truth is that no body knows-It has not been tried. The Industry is both innovative and competitive and we can speculate, as well, that increased profits might ensue. The Report concludes that unbundling is “expected to be” bad for consumers, for many programmers and for Cable Systems-This is seeing into the future without any facts or figures to substantiate the claims. Certainly it is not “bad” to eliminate programming

³ See Appendix Footnote 3

the consumer does not want or considers immoral. It might also result in a reduced-price-After all he will be getting less than the bundle so it should be cheaper.⁴

II. Other Parts Of The Katz Report

On Page 1, The Report says “If it made commercial sense, MVPD suppliers would already be making such offerings”. This, of course, overlooks the fact that, at present, consumers get a bigger package for which more can and is charged. A La Carte programming permits the consumer to pick and choose. If so, he or she can pick and choose less programming which should result in a lower price.

III. Bundling As Opposed To A La Carte May Violate The Sherman Anti-Trust Law

The Report makes various arguments opposing unbundling. Some of these claims are economic, some are poor business model and others relate to reduction of consumer options. All of these pale and are irrelevant if bundling, as presently practiced, violates the law, especially the Sherman Anti-Trust Law relating to Tie-In Sales.

Tie-In arrangements are an object of Anti-Trust concern for two reasons-They may force buyers into giving up purchases of substitutes for the tied product (Times-Pacayne Pub Co. v. United States, 345 U.S. 495) and they may destroy the free access of competing suppliers of the tied product to the consuming market (International Salt Co. v. United States, 332 U.S. 392). A tie-in contract may have one or both of these undesirable effects, when the seller by virtue of his position in the market for the tying

⁴ See Appendix Footnote 4

product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item (United States v. Loew's Inc., 371 U.S. 38).

There is no proof needed that a true tie-in arrangement, as defined by the judiciary, is illegal. Note that market dominance-Some power to control price and to exclude competition is by no means the only test of whether the seller has the crucial economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes. When the tying product is patented or copyrighted, sufficiency of economic power is presumed (Loew's, supra).

The FCC should examine these tying arrangement to determine if they violate the Sherman Act. For example, is it true that many channels that constantly provide violent and sexually explicit programming to our youth are automatically included in the basic Cable TV program packages one must purchase to get any service? If so, this affords such programmers guaranteed income and access to households that really don't want this programming in their homes. Is it legal to compel a consumer to accept MTV 1 and 2 in order to get Basic? Is not this a typical improper and illegal tie-in sale? Does expanded basic also require a tie-in?

We note that there is economic power based on the uniqueness of the service desired (e.g. channels similar to Disney). In such case it should not be necessary to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product. This is even more true where the tying product is copyrighted. (Loew's, supra.)

The Loew's case, is remarkably similar to the instant problem. In that case we find the following:

"To use the Trial's Court's apt example, forcing a television station which wants 'Gone with the Wind' to take 'Getting Gertie's Garter' as well, is taking undue advantage of the fact that to television....there is but one 'Gone with the Wind'".

If we substitute Disney or similar Channels and MTV in the above quotation we find a unique similarity.

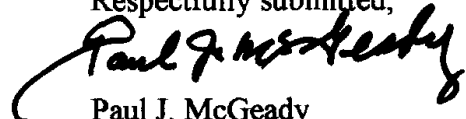
The Loew's Court quotes Paramount Pictures at 354 U.S. 159 as follows:

"We do not suggest that films may not be sold in blocks or groups, when there is no requirement express or implied for the purchase of more than one film".

Applying this to the matter under consideration, Morality In Media, suggests that the FCC rule:

"We do not suggest bundling is not permitted where it is made clear in writing (1) that there is no requirement, express or implied that the consumer must accept the bundle and (2) that he may choose to reject one or more of the offerings".

Respectfully submitted,



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APPENDIX

Footnote 1

The Report claims that there is no logical or factual basis that tiers force people to pay for programming they don't want is directly contradicted by the Report of the United States General Accounting Report to Senator John McCain, Chairman, Committee on Commerce, Science and Transportation, United States Senate of October 24, 2003 entitled "Issues Relating to Competition and Subscriber Rates in the Cable Television Industry". (Hereinafter referred to as "The GAO Report") On page 5-6 of that report we find:

"Because subscribers must buy all of the networks offered on a tier that they choose to purchase they have little choice regarding the individual networks that they receive. Greater subscriber choice might be provided if cable operators used a la carte system wherein subscribers would receive and pay for only the networks they want to watch". (Underlining in original).

On Page 31 of the GAO Report we find:

"Under the current approach, it is likely that many subscribers are receiving cable networks that they do not watch. In fact a 2000 Neilson Media Research Report indicated that house holds receiving more than 700 networks only watch on an average 17 of these networks. The current approach has sparked calls for more flexibility in the manner that subscribers receive cable service including the option of a La Carte service in which subscribers receive only the networks that they choose and for which they are willing to pay".

Footnote 2

The GAO Report on page 32 tells us that this may require that the subscriber pay an additional \$4.39 per month rental for an addressable converter box. What a small price to pay to put the pig out of the parlor! On page 33 the Report informs us that one Cable operator estimates that 40 percent of subscribers already have them. Another cable operator puts this estimate at 75 percent. In fact, the GAO Report at page 33 indicates that electronic manufacturers have recently submitted plans to the FCC to build new televisions sets that will have a built-in functionality that will effectively act in a similar manner to an addressable converter box.

Footnote 3

The GAO is itself uncertain as to the economic effect of a La Carte programming when at page 30 it says:

"A variety of factors...make it difficult to ascertain how many consumers would be better off and how many would be worse off under a La Carte approach"

Footnote 4

See footnotes 1, 2 and 3 above.